IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE THE MARRIAGE OF

JESSICA A. GLANCY,
Petitioner/Appellee,

and

WILLIAM J. GLANCY III,
Respondent/Appellant.

No. 2 CA-CV 2019-0056-FC
Filed November 6, 2019

Appeal from the Superior Court in Pima County
No. D20180031
The Honorable Greg Sakall, Judge

VACATED

COUNSEL

Law Offices of Joseph Mendoza, PLLC, Tucson
By Joseph Mendoza

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 In this marriage dissolution action, William Glancy appeals from the trial court's order granting in part and denying in part Jessica Glancy's motion to set aside the decree filed under Rule 85(b), Ariz. R. Fam. Law P.[1] He contends the court erroneously determined that Jessica had a meritorious and substantial defense to the consent decree. For the following reasons, we vacate the court's order.[2]

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's order. *See Clark v. Kreamer*, 243 Ariz. 272, ¶ 10 (App. 2017). William and Jessica married in January 2006 and have five children together. Beginning in 2008, William worked as an air traffic controller.

¶3 In January 2018, Jessica filed a petition for dissolution of marriage. Later that year, both parties filed their inventories of property and debts, but neither included William's Federal Employees' Retirement System ("FERS") annuity in their filings. William and Jessica then attended a settlement conference and reached a partial agreement, under which Jessica was "awarded her community portion of the retirement in [William's] name."

[1]In her motion to set aside the decree, Jessica cited Rule 85(C)(1)(a) and (b), Ariz. R. Fam. Law P. In January 2019, Rule 85(C) was renumbered to Rule 85(b). *See* Ariz. Sup. Ct. Order R-17-0054 (Aug. 30, 2018); Ariz. Sup. Ct. Order R-05-0008 (Oct. 19, 2005). For consistency purposes, we will apply Rule 85(b).

[2]Jessica did not file an answering brief with this court, and although we may deem her failure to do so as an admission of error, we decline to do so and address the merits of William's argument. *See Gonzales v. Gonzales*, 134 Ariz. 437, 437 (App. 1982) ("Although we may regard this failure to respond as a confession of reversible error, we are not required to do so.").

¶4 In August 2018, the parties signed the settlement agreement, and on August 24 William's counsel drafted the consent decree. The proposed decree stated that "[Jessica] is awarded her community portion of [William's] retirement in his name" without specifying the retirement accounts. The same day, Jessica's counsel contacted Erwin Kratz, who was preparing the Qualified Domestic Retirement Order (QDRO) for the parties. Jessica's counsel provided Kratz language from the proposed decree for the QDRO that would address William's FERS Thrift Savings Plan, but he notified her the language was "[in]sufficient" because it did not address "whether to award survivor benefits to the wife" and did not specify who would pay the costs. Jessica's counsel acknowledged Kratz's FERS concern, and notified William's counsel that Jessica offered to "waive her interest in the FERS plan, including any survivor annuity, in exchange for [William] paying [Kratz's] full fee and a contribution of $2,000 towards her attorney's fees." William accepted the offer.

¶5 In September 2018, Jessica's counsel lodged a decree of dissolution stating that Jessica "waives any interest in [William]'s FERS retirement." The trial court subsequently signed the decree, concluding it was "fair and reasonable under the circumstances." The parties did not sign the decree. The following month, Jessica filed a motion to set aside the decree pursuant to Rule 85(b), alleging, in part, that "a misunderstanding between counsel resulted in a mistake on the division of [William's] FERS retirement account."

¶6 The trial court held an evidentiary hearing and subsequently issued an under-advisement ruling granting in part the motion to set aside Jessica's waiver of William's FERS annuity in the divorce decree. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(2).[3]

[3]An order granting a motion to set aside a judgment is appealable under § 12-2101(A)(2), *see Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, ¶ 13 (App. 2007), without finality language pursuant Rule 78(b) or (c), Ariz. R. Fam. Law P., *see Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420, ¶ 15 & n.4 (App. 2016). Jessica's motion to set aside primarily involved her waiver to the FERS annuity, and William does not attempt to appeal the underlying divorce decree. Because the motion to set aside is distinct from the dissolution decree, the matter is appealable under § 12-2101(A)(2) without Rule 78(b) or (c) finality language. *See In re Marriage of Dorman*, 198 Ariz. 298, ¶¶ 3-4 (App. 2000) (appeal is permissible as long as it "raise[s]

Discussion

¶7 William argues the trial court erred in granting Jessica's motion to set aside the decree as to the FERS annuity under Rule 85(b)(6). Rule 85(b) permits a trial court to grant relief from a final judgment if it finds: (1) "mistake, inadvertence, surprise, or excusable neglect," (2) newly discovered evidence that could not have been discovered timely with reasonable diligence, (3) fraud, misrepresentation, or opposing-party misconduct, (4) "the judgment is void," (5) the judgment has been satisfied, released, or discharged, an earlier judgment it was based on has been reversed or vacated, or its prospective application is no longer equitable, or (6) "any other reason justifying relief." *See also* Ariz. R. Civ. P. 60(b).[4] We review a court's order granting a Rule 85(b) motion to set aside for an abuse of discretion. *See Quijada v. Quijada*, 246 Ariz. 217, ¶ 7 (App. 2019); *see also Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 23 (App. 2004) (abuse of discretion occurs when court commits error of law in process of exercising its discretion). "In doing so, we defer to the court's factual findings so long as there is competent evidence to support them." *Quijada*, 246 Ariz. 217, ¶ 13.

¶8 In its under-advisement ruling, the trial court found that Jessica was not entitled to relief under Rule 85(b)(4) because the parties' failure to sign the consent decree, as required by Rule 45(b)(4), Ariz. R. Fam. Law P., rendered the decree "voidable, . . . not void," and Rule 85(b)(4) does not provide relief for a voidable judgment. The court further found that Jessica was not entitled to relief under Rule 85(b)(1) because her counsel's alleged mistake or inadvertence in waiving her right to the FERS annuity was unreasonable. Specifically, it determined the mistake was "not reasonable" because Jessica's counsel made it during negotiations with William and his counsel, and then "inexcusabl[y]" made the mistake a second time when it was incorporated into the decree that she drafted and submitted to the court.

¶9 However, the trial court concluded that Jessica was entitled to relief under Rule 85(b)(6) because, quoting *Hartford v. Industrial Commission*, 178 Ariz. 106, 111 (App. 1994), Jessica and her counsel made a unilateral

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different issues than those that would be raised by appealing the underlying judgment").

[4]Rule 85(b), Ariz. R. Fam. Law P., is identical to Rule 60(b), Ariz. R. Civ. P., and when "language in [the family rules] is substantially the same as language in the civil rules, case law interpreting the language of the civil rules will apply to [the family] rules." Ariz. R. Fam. Law P. 1(c).

mistake and "Arizona law provides that 'a party will be relieved from an agreement based on unilateral mistake only if the other party knew of and unfairly took advantage of the other party's error.'" Quoting Jessica's motion to set aside, it further explained:

> [T]he evidence supports that [Jessica] and her counsel made a mistake as to what she was waiving[, that s]he has a legitimate argument that she did not bear the risk of the mistake . . . [and] the mistake would be unconscionable or an "epic windfall for [William]" . . . and that in light of the nature of the mistake, [William] had reason to know of the mistake.

The court reasoned that although the FERS annuity would not go into effect for several years, "based upon the mistake and/or inadvertence of her counsel" it was unlikely that Jessica would "surrender[] a . . . substantial sum of money in retirement in return for at most $500."

¶10 A trial court has broad discretion in deciding whether to set aside a judgment for "any other reason justifying relief" under Rule 85(b)(6). *See Rogone v. Correia*, 236 Ariz. 43, ¶ 12 (App. 2014). In determining whether the moving party has presented "special circumstances justifying relief" to set aside a judgment, *Quijada*, 246 Ariz. 217, ¶ 7, the court must consider the totality of the circumstances and "fact-specific considerations informed by the nature and circumstances of the particular case," *Amanti Elec., Inc. v. Engineered Structures, Inc.*, 229 Ariz. 430, ¶ 7 (App. 2012).

¶11 There are two limitations in applying Rule 85(b)(6): (1) "the reason for setting aside the [judgment] must *not* be one of the reasons set forth in the five preceding clauses," and (2) "the 'other reason' advanced must be one which *justifies* relief." *Webb v. Erickson*, 134 Ariz. 182, 186-87 (1982) (facts must "go beyond the factors enumerated in clauses 1 through 5"). "Relief nevertheless has been granted 'with[] a more liberal dispensation than a literal reading of the rule would allow' in 'cases of extreme hardship or injustice,'" *Amanti*, 229 Ariz. 430, ¶ 6 (alteration in *Amanti*) (quoting *Roll v. Janca*, 22 Ariz. App. 335, 337 (1974)), because the purpose of the rule is to provide relief "whenever the circumstances are extraordinary and justice requires," *Webb*, 134 Ariz. at 187.

¶12 In this case, William contends Jessica's consent to the decree was "deliberate, free, and voluntary" and asserts that her reasons for setting

it aside were not "extraordinary," warranting relief under Rule 85(b)(6). We cannot determine whether Jessica's reasons for setting aside the decree were "extraordinary," because the trial court made no finding of extreme hardship or injustice that would so qualify. *See Amanti*, 229 Ariz. 430, ¶ 6. But we agree the court improperly granted relief under Rule 85(b)(6) because the basis for its ruling under that clause and the basis for relief under one of the previous five clauses were not "mutually exclusive." *See Webb*, 134 Ariz. at 186-87.

¶13 Specifically, the trial court's grounds for granting relief under Rule 85(b)(6) were not materially different from grounds for relief under Rule 85(b)(1). The court expressly found that Jessica was not entitled to relief under Rule 85(b)(1) because her counsel's purported mistake was "not reasonable" and "inexcusable." It nevertheless used the same purported mistake as its primary justification for granting relief under Rule 85(b)(6) without explaining any "exceptional additional circumstances," *Amanti*, 229 Ariz. 430, ¶ 10, to render it different from relief under Rule 85(b)(1), *see Webb*, 134 Ariz. at 186-87.

¶14 We assume the trial court's suggestion that Jessica's "defense[]" of a unilateral mistake by her and her counsel, coupled with her "strong arguments that the effect of the mistake would be 'unconscionable' or an 'epic windfall for [William],'" established "exceptional additional circumstances," under *Amanti*, 229 Ariz. 430, ¶ 10, to grant relief. But these "other reasons" stated in the under-advisement ruling were improper to justify relief under Rule 85(b)(6). *See Webb*, 134 Ariz. at 186-87.[5]

¶15 The trial court relied on our explanation of unilateral mistake in *Hartford* to infer that Jessica had a "defense[] to the agreement regarding the FERS" because her and her counsel's unilateral mistake was a sufficient basis for relief. It quoted, "[a] party will be relieved from an agreement based on unilateral mistake only if the other party knew of and unfairly took advantage of the other party's error." *Hartford*, 178 Ariz. at 111; *see also*

[5] The November 2018 and January 2019 evidentiary hearing transcripts were not included in the record on appeal, and, as such, we typically assume they support the trial court's findings. *See Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995) ("When a party fails to include necessary items, we assume they would support the court's findings and conclusions."). However, as explained below, because the court committed an error of law in exercising its discretion, *see Fuentes*, 209 Ariz. 51, ¶ 23, it is immaterial whether the transcripts support the court's factual findings.

Parrish v. United Bank of Ariz., 164 Ariz. 18, 20 (App. 1990) (contract may be avoided if entered into and other party knew or should have known of mistake). But the court overlooked that we also stated in *Hartford* that, "[a] mistake of only one of the parties to a contract in the expression of [her] agreement or as to the subject matter does not affect its binding force and ordinarily affords no ground for its avoidance, or for relief, even in equity." 178 Ariz. at 111 (quoting *Nationwide Res. Corp. v. Massabni*, 134 Ariz. 557, 564-65 (App. 1982)).

¶16 Jessica was represented by counsel during the settlement negotiations, and offered to waive her FERS annuity in exchange for William paying Kratz's entire fee and $2,000 toward her attorney fees. William accepted that offer, and it is unclear how he took advantage of Jessica by doing so. Additionally, the trial court put forth a monthly projection of what Jessica potentially stands to lose if relief is not granted, but, by the court's own admission and extensive financial calculation, William's FERS annuity is uncertain. The court specifically noted the FERS value is currently undeterminable, William is not eligible for an immediate annuity until May 2033, and his benefit is entirely dependent on years of service. Thus, despite the court's projection, there is no guarantee William will receive the hypothetical monthly annuity benefit. Although the result of the court's decree may be "harsh," the court's basis for granting relief under Rule 85(b)(6) was neither unavailable under one of the preceding five clauses, nor were the court's additional reasons proper to establish a basis to justify relief. *See Webb*, 134 Ariz. at 186-87. Therefore, the court abused its discretion by granting Jessica relief under Rule 85(b)(6). *See Quijada*, 246 Ariz. 217, ¶ 7; *Fuentes*, 209 Ariz. 51, ¶ 23.

Disposition

¶17 For the foregoing reasons, we vacate the trial court's order.